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DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Study on treaties, agreements and other constructive arrangements between States and indigenous populations

Preliminary report submitted by Mr. Miguel Alfonso Martínez,
Special Rapporteur

GE.91-12574/3484B

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INTRODUCTION

1. This preliminary report has been prepared by the Special Rapporteur for submission to the Working Group on Indigenous Populations at its ninth session and to the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its forty-third session, pursuant to Sub-Commission resolution 1990/28 of 31 August 1990.

2. The purposes of this report are as follows:

(a) To offer, for the first time, a detailed, analytical "legislative history" of the study on treaties, agreements and other constructive arrangements between States and indigenous populations, from the adoption of the original initiative by the Sub-Commission (resolution 1987/17 of 2 September 1987) to its final authorization by the Economic and Social Council (resolution 1989/77 of 24 May 1989) on the basis of Commission on Human Rights resolutions 1988/56 of 9 March 1989 and 1989/41 of 6 March 1989, and up to the present. By means of this history, the Special Rapporteur seeks to illustrate the particularly vast scope of the tasks entrusted to him and the difficulties inherent in them as they developed during the first stage of his work on the study;

(b) To report to the Working Group and the Sub-Commission on the research and other activities that have been carried out, in accordance with his mandate;

(c) To identify some general and specific issues which, according to the results of his research on the subject, should be dealt with in the study; and

(d) To offer a number of conclusions and recommendations on the future work needed to discharge fully the mandate of the Special Rapporteur.

3. With respect to (b), (c) and (d) supra, the Special Rapporteur seeks to offer to the Working Group and the Sub-Commission a number of elements which hopefully will serve as a basis for a thorough discussion in both bodies which, in turn, will guide him in his future work.

Chapter I

BACKGROUND

4. In Volume V (Conclusions, proposals and recommendations) of Mr. Martínez Cobo's monumental Study of the Problem of Discrimination Against Indigenous Populations, 1/ the Special Rapporteur stressed the paramount importance for indigenous peoples and nations in various countries and regions of the world of the treaties concluded with present Nation-States, or with the countries acting as colonial administering Powers at the time in question.

5. He concluded that a thorough and careful study should be made of various areas covered by the provisions in such treaties and conventions, the official force of such provisions at present, the observance, or lack of effective observance, of such provisions and the consequences of all this for the indigenous peoples and nations concerned.

6. He further noted that in preparing such a study, account must necessarily be taken of the points of view of all parties directly involved in such treaties, a task which required the examination of a large volume of documentation and which, obviously, was an undertaking that could not be satisfactorily carried out within the framework of his own study.

7. He therefore recommended that such a thorough study, devoted exclusively to this subject, should be undertaken in the light of prevailing principles and norms in this field and the opinions and data to be provided by the various sources concerned, primarily the Governments and indigenous nations and peoples that have signed and ratified the treaties. He was of the opinion that only this type of study could determine the present status of such international agreements with the necessary accuracy. 2/

8. At its thirty-ninth session, the Sub-Commission acted upon Mr. Martínez Cobo's recommendation, by the adoption of resolution 1987/17 of 2 September 1987, entitled Study on treaties concluded between indigenous peoples and States. 3/

9. In taking such action, the Sub-Commission was consistent with its resolution 1984/35 A of 30 August 1984, in which it had decided to consider Mr. Martínez Cobo's conclusions, proposals and recommendations as an appropriate source for its future work on the question of discrimination against indigenous populations and for the work of its Working Group on Indigenous Populations on this subject.

10. In adopting resolution 1987/17, the Sub-Commission reacted favourably to the initiative taken in this regard by its Working Group at its fifth session, which in its report to the Sub-Commission had recommended the undertaking of "a study on the treaties concluded between indigenous peoples and States in all parts of the world with regard to the contemporary significance of these treaties for all the parties concerned". 4/ It is worth noting that in the course of the debate held that year in the Working Group, a number of indigenous observers had indeed suggested that the Working Group should recommend to its parent bodies that a Special Rapporteur be appointed by the

Sub-Commission to prepare a study on "the treaties formerly concluded with indigenous peoples in various parts of the world, including their specific provisions, the extent to which they are observed and implemented, and their contemporary significance for the States and indigenous peoples concerned". 5/

11. In its resolution 1987/17, the Sub-Commission endorsed the above-mentioned recommendation of the Working Group and requested Mr. Miguel Alfonso Martínez "to prepare, on the basis of the opinions and data in Mr. Martínez Cobo's report and the views expressed on this issue in the Working Group ... and in the Sub-Commission, a document analysing the general outline of such a study and the juridical, bibliographical and other information sources on which such study should be based, and to submit the document to the Sub-Commission for consideration at its fortieth session [1988]".

12. The resolution also recommended that the Commission on Human Rights recommend, in turn, that the Economic and Social Council authorize the Sub-Commission to appoint Mr. Alfonso Martínez as Special Rapporteur with the mandate of preparing such a study, and to request the Special Rapporteur to present a preliminary report to the Sub-Commission at its forty-first session (1989). 6/ The recommendations contained in resolution 1987/17 were submitted for consideration to the Commission on Human Rights at its forty-fourth session (1988). 7/

13. During the discussion of the Sub-Commission's report at the forty-fourth session of the Commission, the delegations of Belgium, Canada, Norway and the United Kingdom introduced a draft resolution as an alternative to the Sub-Commission's recommendations on the study. 8/ The draft was adopted without a vote, on 9 March 1988, as resolution 1988/56 entitled Study on the significance of treaties, agreements and other constructive arrangements for the promotion and protection of the human rights and fundamental freedoms of indigenous populations. In adopting the text, the Commission broadened, to a considerable extent, the scope of the study originally envisaged by the Sub-Commission on this question in its resolution 1987/17. Since Commission resolution 1988/56 is the basic point of reference for the Special Rapporteur's present mandate, its contents deserve particular attention at this point.

14. In the preamble to this resolution, the Commission - having considered the Sub-Commission's report, in particular resolution 1987/17 - recalled the original mandate of the Working Group on Indigenous Populations under Economic and Social Council resolution 1982/34 of 7 May 1982, reaffirmed its endorsement of Sub-Commission resolution 1985/22 of 29 August 1985 emphasizing standard-setting activities and stressed that "a study on indigenous treaties, as proposed by the Sub-Commission in its resolution 1987/17, would benefit from a thorough examination of the relevant views of ... interested parties potentially involved in such a study".

15. The resolution, in its operative paragraphs, recommended that the Economic and Social Council authorize the appointment of Mr. Alfonso Martínez as Special Rapporteur, with the mandate of preparing "an outline on the possible purposes, scope and sources of a study to be conducted on the potential utility of treaties, agreements and other constructive arrangements

between indigenous populations and Governments for the purpose of ensuring the promotion and protection of the human rights and fundamental freedoms of indigenous populations" (operative para. 1).

16. The Special Rapporteur was requested, in operative paragraph 2, to prepare this outline "giving particular attention to the ongoing development of universally relevant standards and the need to develop innovative, forward-looking approaches to relationships between indigenous populations and Governments taking into account the socio-economic realities of States and the inviolability of their sovereignty and territorial integrity". He was also requested, in operative paragraph 3, to submit this outline to the Sub-Commission "for consideration by the Working Group on Indigenous Populations at its sixth session [August, 1988] ..."

17. The Commission further decided (operative para. 4) to request the Secretary-General to bring the resolution, the requested outline and the deliberations of the Sub-Commission thereon to the attention of Governments, specialized agencies and NGOs, including indigenous organizations, with a view to obtaining comments in advance of the forty-fifth session of the Commission. It also decided (operative para. 5) "to consider further the purposes, scope and sources of the proposed study at its forty-fifth session [1989] in the light of the mandate of the Working Group ..." and the contributions obtained from the various sources mentioned in the previous paragraph.

18. In view of the adoption of resolution 1988/56, the Commission decided to take no action on the original proposals submitted by the Sub-Commission in accordance with its resolution 1987/17. 9/

19. On 27 May 1988, the Economic and Social Council adopted decision 1988/134 by which it authorized the appointment of the Special Rapporteur, with the mandate of preparing the outline described in operative paragraph 1 of Commission resolution 1988/56. It should be recalled that in accordance with operative paragraph 3 of resolution 1988/56, the outline was to be submitted to the Working Group on Indigenous Populations and to the Sub-Commission in July-August of that same year, that is, less than eight weeks after his formal appointment by the Council.

20. The brief period of time granted to the Special Rapporteur to carry out his new assignment as well as the difficulties related to the possible interpretation of some aspects of his new mandate made it impossible for him to submit a written outline before the opening of the Working Group's sixth session (1988).

21. Instead, he decided to make first an oral presentation in which he not only gave to the Working Group his preliminary interpretation of the new mandate, but discussed as well, at length, his ideas on the purpose, scope, sources and structure of a future report on the basis of Commission resolution 1988/56.

22. He further requested from his fellow members of the Working Group, as well as from those Governments and NGOs represented at the session, their comments and guidance on his new task, particularly how the expression "other constructive arrangements" should be construed in the context of his specific

mandate. 10/ Finally, he stated that, after receiving comments from members of, and observers in, the Working Group, he would present his written outline to the Group and to the Sub-Commission. 11/

23. This was done in due course, and members and observers had the opportunity to analyse the document containing the outline requested by the Commission and the Economic and Social Council 12/ before the Working Group adopted its report to the Sub-Commission.

24. The thrust and direction of a possible study on this subject, as outlined by the Special Rapporteur, received ample support in the course of the thorough discussion held in the Working Group. 13/ Further, in its recommendations to the Sub-Commission, the Group formally endorsed the written outline submitted by him and decided "... to recommend to the Sub-Commission that it endorse the said outline and recommend full authorization from the Economic and Social Council in 1989 for the Special Rapporteur to proceed with the study referred to in Commission on Human Rights resolution 1988/56 on the basis of the aforementioned outline". 14/

25. Upon the basis of this recommendation and the debate held in plenary on the Special Rapporteur's outline, the Sub-Commission adopted - at the initiative of 19 of its 26 members and by a conclusive majority - 15/ resolution 1988/20 of 1 September 1988.

26. In this resolution, the Sub-Commission endorsed the outline submitted, and recommended that the Commission request the Economic and Social Council to confirm the appointment of Mr. Alfonso Martínez as Special Rapporteur and to authorize him to undertake the study referred to in Commission resolution 1988/56, and to request the Special Rapporteur to submit a "progress report" 16/ to the Sub-Commission at its forty-first session (1989). These recommendations were submitted for consideration to the Commission at its forty-fifth session (1989). 17/

27. At its forty-fifth session, the Commission adopted, without either debate or vote, 18/ resolution 1989/41 of 6 March 1989, by which it endorsed all the recommendations submitted on this matter by the Sub-Commission in resolution 1988/20. They were thus submitted for approval to the Economic and Social Council at its first regular session of 1989. 19/ By resolution 1989/77 of 24 May 1989, the Council finally authorized the study referred to in Commission resolution 1988/56 and formally confirmed the appointment of the Special Rapporteur to carry it out.

28. It should be stressed that it was only at this point, in late May 1989 - i.e. when the final authorization to carry out the study was granted by the Economic and Social Council - that the systematic, organized research work necessary for the study could start. The uncertainty over whether his appointment would materialize and over the actual scope and nature of the study (both issues still undetermined until that date by both the Commission and the Council) seriously curtailed a thorough effort to this effect in this particularly complex and vast domain.

29. This, of course, did not prevent the Special Rapporteur from continuing to gather data on the subject and to analyse the multiple, varied possible

issues to be dealt with in case the final authorization to initiate the report was to be granted. In this respect, it should be noted that his work depended not only on his (always optimistic) initiative, but on the invaluable help accorded to him, on a purely voluntary basis, by a small number of dedicated individuals (most of them from indigenous organizations), highly motivated by the importance of the issues involved. To all of them goes the gratitude of the Special Rapporteur. It is also worth noting, again in this connection, that the possibility of retaining a consultant for the study (apparently already cleared for a 12-month period by both the Commission and the Economic and Social Council as far back as mid-1988) only materialized last April (and merely as a four-month part-time assignment).

30. By mid-1989, and under the conditions as described, the Special Rapporteur realized it was totally unrealistic for him - both from the point of view of the time available and the magnitude of his initial tasks, as well as because of sheer professional seriousness - to try to produce an early preliminary report on his study. He straightforwardly expressed his concerns to this effect to the Working Group at its seventh session (1989) and was very much comforted by the understanding and encouragement with which his statement on this issue was received at the Working Group and the confidence in his work expressed by many participants. 20/

31. In its decisions and recommendations adopted during its seventh session, the Working Group stated that it looked forward to reviewing the preliminary report on treaties, agreements and other constructive arrangements at its forthcoming eighth session (1990) and decided to include in its agenda a separate item devoted to the issue. 21/

32. At its forty-first session and on the basis of the Working Group's report, the Sub-Comission adopted resolution 1989/38 of 1 September 1989. After expressing its interest in examining the Special Rapporteur's preliminary report at its forty-second session (1990), the Sub-Commission authorized him once again to carry out the originally (1988) scheduled research trips to the Archivo de Indias in Seville and the Library of Congress in Washington D.C. It also requested the Secretary-General to give him all the assistance required for carrying out his study, particularly to take the necessary steps to retain the consultant who was to give him assistance during the 1990-1991 biennium.

33. The research missions to the Archivo de Indias and the Library of Congress were considered by the Special Rapporteur (and for good reasons) as crucial for the gathering of basic data for the study and his overall comprehension of the various issues stemming from his mandate. Unfortunately, due to several reasons (particularly because of his academic duties), it was not possible to visit the Archivo until mid-March 1990. For similar - as well as other - reasons the Library of Congress could only be explored at the end of April of the present year.

34. The more he advanced in his data-gathering and analysis processes, the more it was evident to the Special Rapporteur that it would be impractical to submit a comprehensive preliminary report before clarifying a certain number

of questions. These related not only to the actual number and types of instruments and situations to which his mandate applied, but also to various fundamental juridical, sociological and anthropological issues related to his task, on which the specialized literature (and/or legal documentation) was either not easily available to him or - to the best of his knowledge - did not exist at all. It was (and still is) his considered opinion that this gap could only be bridged by directly requesting access to such key information from the parties involved, i.e. Governments and indigenous peoples/organizations.

35. The Special Rapporteur shared his views on this matter with the Working Group at its eighth session (1990). He explained in detail to his colleagues and other participants the reasons which compelled him to submit to them in 1990 not a preliminary report, but a brief working paper and two questionnaires he had prepared: one addressed to Governments, the other to indigenous peoples/organizations. Both identified the information he needed for his ongoing work on the mandated study. 22/ He also briefed the Working Group on various aspects of the progress achieved in his work and his plans for the immediate future with respect to the research work required. 23/

36. In its conclusions and recommendations, the Working Group expressed its appreciation to the Special Rapporteur for the information and flow of ideas he had provided concerning the progress made on the study and encouraged Governments and indigenous peoples to respond in detail to the questionnaires he had prepared. It further decided to reproduce his questionnaires together with the accompanying working paper as an annex to its report to the Sub-Commission. 24/

37. After having examined the report of its Working Group, the Sub-Commission adopted resolution 1990/28 of 31 August 1990, in which it took note of the above-mentioned working paper and questionnaires and requested the Secretary-General to submit the questionnaires to Governments, to intergovernmental and non-governmental organizations, and to indigenous organizations and/or representatives who had attended previous sessions of the Working Group, requesting them to submit to the Special Rapporteur all information they would deem useful for the report, if possible not later than 30 April 1991. It also requested the Secretary-General to provide the Special Rapporteur with all the assistance he might require for carrying out his study, particularly the services of the consultant originally foreseen and a study trip to Washington and Seville. Finally, the Sub-Commission requested the Special Rapporteur to submit a preliminary report to the Working Group at its ninth session and to the Sub-Commission at its forty-third session.

Chapter II

RESEARCH WORK AND OTHER ACTIVITIES CARRIED OUT BY THE SPECIAL RAPPORTEUR

38. Since the adoption by the Sub-Commission of its original, more modest and precise initiative (resolution 1987/17), it was clear that Mr. Martínez Cobo's concerns about the magnitude of the additional study he had suggested (see supra, paras. 5-7) were well founded.

39. All those who, like the Special Rapporteur, found his recommendations particularly thought-provoking, most valuable and topical, knew that such an undertaking implied the analysis of hundreds of juridical instruments and judicial decisisons, as well as of a relatively large amount of legislative and administrative measures that could be in effect; in relation to those treaties, in an undetermined number of countries. It also implied a thorough perusal of hundreds of scientific and scholarly writings (juridical, historical, sociological and anthropological), and the analysis of the points of view of all parties directly concerned in such treaties.

40. From the point of view of the necessary research work, in broadening the subject of the study (from treaties alone to "treaties, agreements and other constructive arrangements") the mandate conferred on the Special Rapporteur under the terms of Commission resolution 1988/56 clearly multiplied his burden in this crucial element of the study.

41. As is known, treaties and agreements are instruments perfectly identifiable and, as a rule, easily available in a number of well-known national and international legal compilations.

42. On the contrary, to identify a "constructive arrangement" (arguably a non-juridical or, at best, a quasi-juridical term) a researcher must, in the first place, undertake a much more extensive search of all normative actions by the various branches of Government which, within the national juridical system of a given Nation-State, are related to indigenous affairs. This highly time-consuming exercise is unavoidable in order to locate laws, decrees, administrative and other regulations, etc. which may eventually qualify as "constructive arrangements".

43. Secondly, after having located a certain number of these types of document, he will have to exercise a high degree of discretion to determine which, among them, can be considered as such. This, in turn, requires the establishment, on the part of the researcher, of the necessary criteria for identifying any of them as an actual "constructive arrangement". The establishment of such criteria was, of course, one of the first tasks that the Special Rapporteur set out for himself (see more on this subject in paras. 96-97 infra).

44. Consequently, since early 1988, the Special Rapporteur has dedicated considerable time and effort, first, to identify, locate and gather all instruments which, according to his own perception and the sources available to him, could be considered prima facie as treaties and agreements of possible relevance for this study; and then - after he was formally authorized by the

Economic and Social Council in mid-1989 to undertake it - to initiate the thorough analysis of their respective contents required for determining the potential value that each of them may have for the present study.

45. As of the date of this report, the available texts of more than 400 of these instruments are already in the possession of the Special Rapporteur. He wishes to record his appreciation for the cooperation granted, in this regard, among others, by the Governments of Canada and New Zealand, by the Executive Board of the International Indian Treaty Council, and the officials of the Law Library, Library of Congress (Washington D.C.), as well as by Dr. C. M. Eya Nchama, the representative in Geneva of the International Movement for Fraternity among Races and Peoples and Mr. Andrew Gray of the International Work Group for Indigenous Affairs.

46. On the other hand, it goes without saying that the aforementioned analysis of the possible pertinence and value of this material for this study is still to be determined. It is clear that this process will still take some months.

47. With respect to "other constructive arrangements", the possible relevance of national legislation and other normative elements within the framework of State municipal law is self-evident. Notwithstanding, the process of identifying, locating and actually gathering the texts is indeed cumbersome and sometimes quite difficult. Some useful elements in this regard are provided by the Martínez Cobo report but, logically enough, they require a thorough updating. The Governments of Argentina, Canada, Colombia and Venezuela have made available valuable materials in this field. So has the Grand Council of the Crees (Quebec). None the less, the Special Rapporteur is far from having had access to all the documentation required to explore this area in depth. The process of organizing and reviewing the materials already available to him has barely started.

48. On the other hand, as a logical consequence of the broadening of the study's subject matter, the number of potentially relevant decisions by national courts and of scientific research work appearing in specialized publications considerably increased as well. The Special Rapporteur has either identified himself to or received from various sources a vast amount of such material - many of them photocopied at considerable expense - which until now have been explored only partially (the number of pages well exceeds 5,000). Professors Douglas Sanders, Howard Berman, Robert Williams and Russell Barsh, and Ms. Sharon Venne (among others) have made substantial contributions to this particular aspect of the research already carried out.

49. At this point, the Special Rapporteur believes that it is totally unnecessary to argue once again the need for some kind of continuous professional full-time assistance for this study, at least for some limited period of time.

50. It must be stressed that at the time of the adoption of the more limited original initiative by the Sub-Commission in 1987 (resolution 1987/17) the authorities of the Centre for Human Rights directly in charge of this matter

unequivocally advised the Special Rapporteur that the Centre was not in a position to make any substantial contribution (either with respect to research, analysis or drafting) in connection with this study, due to staff shortages and the increasing number of activities entrusted to the Centre.

51. It was following their advice that the request for this type of external assistance (for a period of 12 months) was advanced in 1988 (after the Commission adopted resolution 1988/56), then accepted by the Sub-Commission in its resolution 1988/20 and later approved by Commission resolution 1989/41 and Economic and Social Council resolution 1989/77.

52. During the 20 months between the final authorization of the study and January of the current year, a number of meetings were held on this subject with several officials of the Centre. Finally, on 1 April 1991, a consultant was retained but only on the basis of a four-month part-time contract. As stated earlier, the need for continued assistance of this kind (either provided by the Centre staff or by external expertise) is abundantly clear, particularly in view of the large number of historical and juridical sources expected to be gathered, organized and reviewed during the coming months.

53. Seeking to expedite as much as possible this essential data gathering and processing work, the Special Rapporteur took a number of steps, which included not only the request for cooperation from a number of individuals both in his country of residence and abroad (particularly in Geneva), but also the two previously mentioned research trips (to the Archivo de Indias in Seville and the Library of Congress in Washington D.C.).

54. It must be pointed out that both missions were particularly useful, notwithstanding the short period (five working days) of the authorization received to that effect. In Seville, due to the organizational characteristics of the Archivo, those five days only allowed the Special Rapporteur to get acquainted with its peculiarities and thorougly peruse the sole section with a workable index. A second research visit to this worthy institution is absolutely necessary in the near future, as already foreseen in document E/CN.4/1991/2 (annex III, resolution 1990/28). Its authorities granted all possible assistance to the Special Rapporteur, who is most grateful to all of them.

55. At the Law Library of the Library of Congress, access was granted to all sections and their computerized systems. A considerable number of thematic printouts was obtained as well as other highly valuable information on matters related to this study. This information refers not only to possibly relevant treaties, agreements and other constructive arrangements and situations in a particular country, but in several countries in different parts of the world. The assistance provided by the Director of the Law Library and her staff was simply extraordinary. To all of them goes the gratitude of the Special Rapporteur.

56. Yet another important step taken to try to bring to an early conclusion this initial phase of the research on the subject was the direct request for documentation - and for all other information they considered relevant to his

study - addressed to all States members of the United Nations, to intergovernmental and non-governmental organizations and to indigenous peoples/organizations. This was done by means of the two questionnaires referred to in paragraphs 35-37 supra. It must be recalled that the contents of both questionnaires were included in the report of the Working Group on its eighth session (1990) as annex VI to that document (E/CN.4/Sub.2/1990/42).

57. It should be noted that one of them was expressly addressed to indigenous peoples/organizations. With this, the Special Rapporteur sought, in the first place, to respond to the emphasis placed by both the Commission on Human Rights (resolution 1988/56) and the Martínez Cobo report on the importance of the study taking into account the relevant views of all parties directly or potentially involved in the issues under consideration. Secondly, this was intended to make available to him information on a number of issues (basically of a historical, juridical and institutional nature) related to indigenous participation in treaties, agreements and other constructive arrangements. In many cases, to the best knowledge of the Special Rapporteur, such information is either unavailable in the existing literature on this matter, or has not been fully made public authoritatively by the indigenous peoples/organizations themselves.

58. As may be recalled, the decision to send these questionnaires to the interested parties (resolution 1990/28) was adopted by the Sub-Commission on 31 August 1990. Most unfortunately, according to the information available, the actual process of mailing the notes and letters which addressed this issue (together with other matters related to various decisions adopted that year by the Sub-Commission on indigenous questions) - dated 10 December 1990 - was only completed during the first week of January 1991, due to the diversity of tasks that burdened the Centre's staff during the last quarter of 1990. Additionally, a certain number of indigenous organizations that had participated in previous sessions of the Working Group informed the Special Rapporteur that the letters addressed to them never reached their destination.

59. Not surprisingly, the Centre has informed the Special Rapporteur that only one Government reply was received before 30 April 1991, the date suggested to the addressees for submitting the information requested. He has also been advised that as of 19 July, only a handful of replies had arrived. Obviously, it has not been possible for him to analyse these replies.

60. In the opinion of the Special Rapporteur, one of the most suitable ways to enhance his overall understanding of indigenous issues related to his study is to carry out field research with indigenous peoples in their communities. Since the authorization of the study by the Economic and Social Council, he has been honoured to accept three different invitations extended to him by indigenous authorities and organizations based in Canada and the United States.

61. In July 1989, he visited the Onion Lake reserve in the province of Saskatchewan, Canada, where he attended the first Treaty Forum organized by Canada's Treaty Six communities. In February 1991, he received an invitation from the International Indian Treaty Council (IITC) to be present at five different hearings on indigenous treaties that were to be held at the end

of March 1991 (immediately after the conclusion of the Special Rapporteur's United Nations-mandated research mission to the Library of Congress). The hearings were scheduled to take place in the States of New York, South Dakota, Minnesota, Washington and California. For reasons still unclear to the Special Rapporteur, the visa allowing him to enter United States territory was granted with great delay and by the time it was received, all five hearings had been held in his absence. With this, a most interesting opportunity of increasing his knowledge on matters topical to his study was lost. None the less, upon the reception of his entry visa, he had the pleasure to be present, as an observer, at the meetings of the IITC Executive Board held in San Francisco, California on 19-21 April last. Finally, during the last week of June, again at the invitation of some communities of Canada's Treaty Six area, he attended their Third Treaty Forum at the Saddle Lake reserve in Alberta.

62. The Special Rapporteur wishes to record his thanks to former Chief Wallace Fox, of the Onion Lake reserve, to the Executive Board of the IITC and to Chief Carl Quinn, of the Saddle Lake reserve, for their invitations and the warm hospitality granted to him.

63. Finally it must be noted that on the occasion of this recent trip to the Treaty Six Forum, the Ministry of External Affairs and International Trade of Canada facilitated a most fruitful exchange of information and points of views on indigenous issues in that country (and other topics related to this study) between the Special Rapporteur and officials of four federal departments concerned with indigenous affairs. He is indebted to all those who participated in this very cordial encounter, particularly Mr. Denis Marantz, Departmental Coordinator (International Aboriginal Affairs), International Organisations Bureau, Ministry of External Affairs of Canada, for having encouraged such a meeting and presiding over it.

Chapter III

SOME BASIC ISSUES RELEVANT TO THE MANDATE OF THE SPECIAL RAPPORTEUR

A. The mandate

(a) Resolutions and decisions adopted by the Sub-Commission, the Commission and the Economic and Social Council

64. As indicated elsewhere in the present report (see paras. 26 and 27 supra), the Special Rapporteur's mandate is clearly established in four different resolutions, i.e. Sub-Commission resolution 1988/20, Commission resolutions 1988/56 and 1989/41 and Economic and Social Council resolution 1989/77. The most relevant aspects of the contents of all of them are mentioned, respectively, in paragraphs 13-18, 26 and 27 supra.

65. It should be noted that Sub-Commission resolution 1988/20, Commission resolution 1989/41 and Economic and Social Council resolution 1989/77 refer to the outline submitted by the Special Rapporteur to the Working Group and the Sub-Commission in July 1988 pursuant to Commission resolution 1988/56 and Economic and Social Council decision 1988/134. Consequently, it is pertinent to recall, at this stage, some aspects related to that outline.

(b) The 1988 outline

66. The outline was submitted - first orally and then in written form - to the Working Group's sixth session (1988). It appeared in document E/CN.4/Sub.2/1988/24/Add.1. It was thoroughly discussed and later endorsed by the Working Group and was considered by the plenary of the Sub-Commission which also explicitly endorsed it and considered it a good basis for carrying out the study (resolution 1989/20, operative para. 1).

67. It should be recalled that in that document, the Special Rapporteur went beyond what had been requested of him by the Commission in resolution 1988/56 and by the Economic and Social Council in decision 1988/134. Not only did he provide both bodies - as mandated - with his ideas on "the possible purposes, scope and sources" of the study proposed, but he gave his perceptions on what its tentative structure should be.

68. Further, in its resolution 1989/41, the Commission, after having examined the outline (fourth preambular paragraph), formally recommended to Economic and Social Council to take note of the document (second preambular paragraph of the text recommended for adoption by the Council). The outline elicited neither critical remarks nor other comments or suggestions from the Commission at that time. It should be stressed that the Economic and Social Council, in finally authorizing the study and confirming the appointment of the Special Rapporteur, took into account - as recommended by the Commission - his outline (resolution 1989/77, third preambular paragraph).

69. Therefore, all the Special Rapporteur's past, present and future work on this study has been, is and will continue to be based on the provisions of the cited resolutions and decisions, as well as on the elements provided in his 1988 written outline.

70. Additionally - following the overall point of reference provided by the Sub-Commission in its resolution 1984/35A - he has taken and will continue to take into account the contents of the Martínez Cobo report. It goes without saying that the contents of the discussions on this issue which will take place in the future in both the Working Group and the Sub-Commission or in other bodies will be considered by him as a particularly relevant source of guidance for his future work.

B. The purpose of the study

71. The Special Rapporteur's deep conviction concerning what must be the ultimate purpose of the study has not changed since he submitted his 1988 outline. Because of the deeper knowledge he has at present with respect to a variety of situations affecting both Nation-States and a considerable number of indigenous peoples, he now restates his firm belief that his study must offer elements, conclusions and recommendations for the achievement, on a practical level, of the maximum promotion and protection possible, both in domestic and international law, of the rights of indigenous populations and especially of their human rights and fundamental freedoms.

72. This belief is not based solely on his own personal understanding, as of this date, of the said situations, some of which have (or may have in the future) a very serious, albeit avoidable, disruptive potential.

73. In more than one way, his construction of what should be the ultimate purpose of the study is merely a confirmation of the perceptions which, in his view, clearly conditioned the will of the 43 States Members of the Commission on Human Rights when adopting - without a vote - resolution 1988/56. It must be borne in mind that in its operative paragraph 2 they unequivocally indicated that this exercise was intended to "... [ensure] the promotion and protection of the human rights and fundamental freedoms of indigenous populations". Further, the same day on which the Commission finally recommended to the Council that it authorize the study, it declared itself "conscious that, in various situations, indigenous populations are unable to enjoy their inalienable human rights and freedoms" (resolution 1989/34 of 6 March 1989, sixth preambular paragraph).

74. Three years ago, the Special Rapporteur attempted additional clarification of this key element of his task. He stated that he saw this study as a possible contribution to a most significant, multi-faceted process taking place in the world at that time, both at the State level and the international level (bilateral or multilateral). He perceived that said process:

> "... was advancing towards the creation of juridical standards negotiated and approved by the interested parties and aimed at promoting and protecting more effectively all rights and liberties of indigenous populations, in order to secure solid, durable and equitable bases for the current and, in particular, future relationships between those populations and States."

(1988 outline, para. 11).

75. Several elements contributed to his impressions on the subject. At the time, certain States were giving serious attention to a number of historical and contemporary events which presumably were at the roots of their strained relations with indigenous peoples subject - in one way or the other, to a greater or lesser extent - to their jurisdiction. At least in one case, that soul-searching process led to a most courageous recognition of an historical debt to the aboriginal peoples that were displaced from their ancestral lands by the forefathers of those who occupy them now.

76. Additionally, in another State, unprecedented basic legislation on State-indigenous relations had been passed, apparently in consultation with indigenous representatives. In yet another State, the initial steps for negotiating with an indigenous people a new treaty on matters quite close to those regulated by a preceding instrument were already under way.

77. At multilateral fora, the growing worldwide attention to indigenous issues was quite visible. The initial phase of the process, which was to lead to the adoption by the General Conference of the International Labour Organisation of the Convention (No. 169) on Indigenous and Tribal Peoples, was ongoing with strong participation by indigenous organizations.

78. At the same time, the Sub-Commission's Working Group on Indigenous Populations had already given priority to the drafting of a declaration on indigenous rights, a document expected by many quarters to be a landmark of international action in the field of human rights.

79. Although it could reasonably be argued that some gains in this sphere can be noted at present (particularly with respect to a growing awareness of the critical importance of indigenous issues by both State authorities and international public opinion), there are also reasons to believe that those most encouraging elements visible in 1988 have not yet come to fruition and need to be revitalized.

80. In some countries, for example, recent decisions by national courts related to indigenous religious and land rights have merited serious criticism from both indigenous and non-indigenous sources. In another country, additional legislation required for the full implementation of basic provisions for State-indigenous relations was still pending some months ago, according to information received by the Special Rapporteur. At least on two occasions, indigenous perceptions that their rights were not being recognized brought about serious incidents in which violence occurred. Further, the results of the ILO initiative to update Convention No. 107 (1957) by means of a new instrument (i.e. Convention No. 169) were received by a number of indigenous organizations with dismay and bitterness stemming from what they considered the very much restricted nature of their participation in the deliberations at the Conference and from the actual contents of the new Convention.

81. On the other hand, certain initiatives undertaken in this sphere by both intergovernmental and non-governmental organizations are received with apprehension by some Governments, which regret what in their view is undue attention to matters of relatively minor overall importance and pertaining,

after all, to their domestic jurisdiction. In other cases, national authorities resent what they understand as high-handed actions by indigenous peoples in claiming what the latter consider as their unimplemented rights.

82. For all these reasons, there is a clear need for the "innovative, forward-looking approaches" to relationships between indigenous peoples and Governments called for by the Commission in resolution 1988/56. The Special Rapporteur is of the opinion that this need is even more pressing today than at the time when this study was commissioned.

83. In the light of what he considers to be the ultimate purpose of this study and of present-day realities, he is confident that he will be able to offer, at the end of his mandate, some useful conclusions and recommendations aimed at encouraging, reinforcing or expanding a much-needed confidence-building process among all parties concerned in what today are basically antagonistic situations.

84. At this stage, it is not difficult to predict that all his recommendations on this matter will attempt to offer a contribution to the realization of the key proposition of his overall approach to State-indigenous relations, i.e. mutual recognition, harmony and cooperation, instead of an attitude of ignoring the other party, confrontation and rejection. This approach should be the basic foundation for the more solid, lasting and equitable relations that will necessarily have to exist between indigenous peoples and States.

85. The recommendations will be intended to encourage a comprehensive process of standard-setting - at national and international levels - through negotiations to be carried out on the basis of good faith, mutual understanding of the other party's vital interests, and deep commitment from all of them to respect the eventual results of the negotiations.

C. The nature of the study

86. It has always been the opinion of the Special Rapporteur that the original study envisaged by Mr. Martínez Cobo and recommended by the Sub-Commission in 1987, as well as the one finally authorized by the Economic and Social Council in 1989, had to be, first and foremost, of a technical-juridical nature.

87. Regrettably, in order to stress this strongly felt idea, he phrased it in a perhaps too rigid manner in his 1988 outline, where he stated that the study "... must be exclusively of a technical-juridical nature" (para. 9).

88. From the reading of other parts of that document it was absolutely clear, however, that elements other than juridical had to be present in it. For example, historical developments and historical reasoning cannot be excluded from its final content. This was suitably noted in paragraphs 12, 14 and 18 of that same document. Likewise, the need to include in it anthropological and sociological aspects is self-evident when one reads paragraph 15 and the final part of paragraph 18.

89. The more he advances in his research and enhances his understanding of the innumerable issues and situations which are to be dealt with in the study, the more he is convinced that the juridical perspective must be its unequivocal focal point. But, at the same time, his understanding of the need to keep very much in mind certain anthropological and sociological elements is also strongly felt.

90. Full understanding, for example, of the ways in which indigenous authority is conferred upon, and exercised by, certain individuals, of the basic juridical parameters existing in the various indigenous societies, and of the meaning of a treaty for the indigenous party to it are essential for the study. Likewise, ample knowledge of various social indicators of indigenous societies (e.g. median income, incidence of phenomena such as unemployment, illiteracy, life expectancy and certain diseases, and participation in the overall institutional system of the Nation-States) are quite relevant not only for assessing the practical results of treaties, agreements and other constructive arrangements between them and Nation-States, but also to make recommendations for the continued utility of such texts and to identify possible subjects for future instruments of that type.

91. It is the intention of the Special Rapporteur to continue taking fully into account a number of the above-mentioned historical, anthropological and sociological aspects of the general issue, while maintaining the key thrust of the study on its juridical dimension.

D. The geographical scope

92. The research carried out to date by the Special Rapporteur has been aimed at identifying possibly relevant treaties, agreements and other constructive arrangements in all parts of the world.

93. In his 1988 outline, he stated that it was necessary for him:

> "to obtain references and analyse examples of situations regulated by [said instruments] in any part of the world in which [their] historical or contemporary existence is confirmed or where they may still come into being in the future through a process of negotiation and cooperation."

94. This has been, and will continue to be, his point of reference in this regard until the not-too-distant date on which his data-gathering process will be completed with the receipt of the information requested in the questionnaires sent to States, to intergovernmental and non-governmental organizations, and to indigenous peoples/organizations.

95. In proceeding with his research, the Special Rapporteur has taken several theoretical and practical decisions which have markedly influenced his task.

96. First - as was explicitly announced before the Working Group at its seventh session (1990) (see document E/CN.4/Sub.2/1990/42, para. 131) - he reached the conclusion that to all practical and conceptual effects of his study (and in the light of the spirit and the letter of Commission resolution 1988/56 and other decisions on indigenous issues adopted by that

body), the expression "other constructive arrangements" should be construed as referring to any legal text and other documents which are evidence of consensual participation by all parties to a legal or quasi-legal relationship.

97. This will continue to be his guideline on all matters related to the study until the completion of his mandate.

98. Secondly, he considered that both in the data-gathering phase of his work and in his analysis of the results obtained, he should strictly adhere to the practice followed in United Nations work in this sphere of distinguishing between "minorities" and "indigenous populations" (peoples). He is very much aware of the degree of discretion that he will have to exert because of this decision and the practical difficulties inherent in it. Nevertheless, he is confident of being capable of differentiating the latter with total objectivity and sound reasoning.

99. This also will continue to be his guideline on all matters related to the study until the completion of his mandate.

100. A third decision led him to research the activities carried out during the sixteenth, seventeenth, eighteenth and nineteenth centuries by the entities known as royal or charter companies which were quite active in certain regions of the world in those times. It is still to be determined whether or not the contracts and other juridical instruments which they concluded with indigenous peoples in those areas fall within his mandate. Until now, several of them are already in the possession of the Special Rapporteur.

101. As was stated elsewhere in this report, more than 400 instruments which may or may not qualify as treaties and agreements have already been gathered. Most of them come from the Americas (mainly from English-speaking North America) and New Zealand. There are a number of them pertaining to Africa and to the Asia-Pacific region.

102. The legal tradition and certain practices followed by the original British colonisers and by their successors in some of the above-mentioned areas explain the noticeable numerical imbalance of the materials gathered in comparison with the different parts of the world.

103. The deeper knowledge of this specific aspect of the history of the Latin American region acquired by the Special Rapporteur since the beginning of the study - particularly on the practices followed by the Spanish conquistadores - and the visit to the Archivo de Indias have confirmed one of his initial impressions, i.e. that there would be few, if any, treaties or agreements that could be traced back to colonial times in South and Central America as well as in present-day Mexico.

104. On the other hand, several sources have made available to him a small number of documents related to situations in South America which date back to early republican days in at least two countries in that area.

105. An entirely different situation arises with regard to other constructive arrangements. Here, a certain regional numerical balance of the documentation already at his disposal does exist, although this is not, of course, a final conclusion. Much would depend on two factors: (a) the materials that will actually be received in response to the questionnaires as well as from other sources; and (b) the result of applying to each of them the established criteria to identify any of them as an actual constructive arrangement (see para. 96 supra).

E. The temporal scope

106. There is not much to add at this stage to the considerations that were advanced on this respect in the 1988 outline. The Special Rapporteur remains convinced that the study's main thrust should not be centred on the conclusion in the past of treaties, agreements and other constructive arrangements or on the discussion of situations generated by the eventual termination - de facto or de jure - by one of the parties of those instruments or on the violations (alleged or real) of their contents by one or all of the parties involved.

107. As a result of the progress made in his bibliographical research work, his study trips and his fieldwork, as well as of the contributions from a variety of sources, the Special Rapporteur has had access to a considerable amount of allegations of violations of the rights established in a number of instruments relevant (or possibly relevant) to his mandate. Some of them seem to be, prima facie, solidly documented. In some (not all) cases he has also had access to the points of view and counter-arguments of the other party to those instruments.

108. It would be neither possible nor proper for him, at this early stage, to advance conclusions about these allegations. Some of them require a most exhaustive examination, which has not been possible to carry out as of this date. In addition, it is not certain that all the situations and the instruments involved are relevant to the Special Rapporteur's present mandate.

109. In this connection, it is also useful to recall that the main thrust of the study should be forward-looking. This, of course, does not preclude the analysis of past and present relevant situations, "to the degree to which they may affect the more practical objective of the study, that is, ... to project into the future past and current experiences derived from such instruments", as was stated in the 1988 outline (para. 14).

F. The juridical scope

110. Considerable progress has been made in the collection and review of juridical materials for the study. This has been posible with respect to practically all the different kinds of sources which were mentioned in the 1988 outline: national and international norms and standards, opinions and decisions of national and international courts, specialized publications and bibliographical materials.

111. Notwithstanding this progress, a very important lacuna exists in this connection, i.e. documentary information on the norms that regulate the lives of indigenous societies, and the latter's legal, political and social practices.

112. It is the hope of the Special Rapporteur that this gap will be filled when the replies from indigenous peoples/organizations to the 1990 questionnaire are received. This material is absolutely essential for the progress report he plans to submit in 1992 and 1993. He therefore makes a most urgent appeal to indigenous sources to submit the information requested as soon as possible, since the task of getting fully acquainted with this information is practically impossible without their cooperation.

113. A similar appeal is hereby made to the Governments and to intergovernmental and non-governmental organizations which, because of time constraints or other reasons, could not submit their replies to the questionnaires by the date suggested (30 April 1991). It is of the utmost importance for the Special Rapporteur to have access to all normative elements which govern issues relevant to his mandate within their domestic jurisdiction, particularly those which in their opinion may fall within the category of "other constructive arrangements".

114. The Special Rapporteur has dedicated time to consider in depth three particular issues of a juridical nature which retained his attention as he progressed in his research: (a) the activities of the so-called charter companies (see para. 100 supra); (b) the legal status of indigenous peoples who are not parties, at present, to any treaty, agreement or constructive arrangement; and (c) the issue of national and international conflict-resolution mechanisms. His thoughts on these issues are not fully developed, but he has decided to include some of his preliminary ideas on each of them in this report, in the hope that in doing so some comments on them may be advanced in the deliberations of the Working Group and the Sub-Commission for guidance in his future work.

115. For a number of reasons, it is still unclear to the Special Rapporteur which of the three categories of instrument relevant to the study ("treaties", "agreements" or "other constructive arrangements") may be applicable to the juridical instruments concluded between the royal or charter companies and other peoples in various parts of the world.

116. This uncertainty stems, first, from the fact that only a very limited number of these instruments have been gathered. Secondly, it has not been possible for him to give to them the very close and extensive review required for such a choice (whether they would qualify at all as being within his mandate, as he now feels). His final conclusions on this issue will be reached, obviously, on a case-by-case basis, since the nature of the powers granted to these companies and the contents of the texts appear to be rather varied.

117. With respect to the situation of indigenous peoples not parties to any treaty, agreement or constructive arrangement, it is the considered opinion of the Special Rapporteur that these peoples are relevant indeed to his mandate. His reasoning on the matter is relatively simple: these groups may be the ones more in need of acquiring solid guarantees of their rights and freedoms.

118. The importance and complexity of the question of national and international conflict-resolution mechanisms are quite obvious. The first

aspect to be analysed is the actual capability of existing mechanisms to deal effectively with a number of situations which have been latent for decades (even centuries) in a prompt and preferably preventive manner. Secondly, the well known sensitive issue of national versus international jurisdiction instantly arises. Thirdly, it seems logical that ensuring the effective participation in these mechanisms by all parties concerned - be this at the national or international level - will add to the difficulties in this respect. None the less, it is clear that ways and means of encouraging the establishment of this kind of mechanism should be explored, taking into account the interests of all parties concerned.

G. The structure of the study

119. The ideas of the Special Rapporteur on the subject - as expressed in his 1988 outline (paras. 21-23) - remain unchanged at this stage.

120. It should be recalled that in that document, he stated that he contemplated a three-part study. The first is to be dedicated to the origins of the practice of concluding treaties, agreements and other constructive arrangements between indigenous peoples and States; the second will deal with their contemporary significance and the third will discuss their potential value as elements for the regulation of the future relationships between indigenous peoples and States.

121. It is important to emphasize, at this point, that changes in this respect are still possible.

Chapter IV

CONCLUSIONS AND RECOMMENDATIONS

122. In the various parts of the present report, the Special Rapporteaur has offered his preliminary conclusions on the merits of several issues reviewed at this stage. This chapter contains his conclusions and recommendations on certain aspects related to his future work.

123. It is abundantly clear that the amount of work still pending with respect to data-gathering and reviewing is considerable. It is foreseeable that even more materials will be received during the coming months upon receipt of the replies to the questionnaires addressed to Governments, intergovernmental and non-governmental organizations and indigenous peoples/organizations.

124. The importance of the documentation requested in the questionnaires is quite evident. Ways and means should be explored to try to obtain as many replies as possible.

125. On the other hand, the difficulties encountered in establishing rapid and secure communications between the Special Rapporteur and the Centre for Human Rights have been troubling, particularly because neither could possibly be blamed. It is unclear, as of this date, whether those difficulties could be remedied in the immediate future.

126. Consequently, the Special Rapporteur has decided to establish a time-limit (28 February 1992) for accepting materials to be processed and taken into account in his progress report, scheduled for submission in 1992.

127. The Special Rapporteur is not certain whether he will be in a position to submit a comprehensive thorough progress report on all aspects of his mandate by that date, particularly if it is not possible to receive professional assistance for his work, provided either by the Centre staff or by external expertise.

128. Because of these considerations the Special Rapporteur offers the following recommendations:

(a) The contents of the questionnaires should be reproduced again this year as a separate annex to the report of the Working Group and circulated in the usual manner;

(b) The permanent assistance required by him for his future work should be guaranteed in any of the two forms referred to in paragraph 127 supra;

(c) The Special Rapporteur should be authorized to submit a partial progress report in 1992 and the full progress report in 1993.

Notes

1/ Document E/CN.4/Sub.2/1986/7/Add.4 (also available as United Nations publication, Sales No. E.86.XIV.3).

2/ Ibid., paragraphs 388, 389, 390, 391 and 392.

3/ The draft, which was later adopted as resolution 1987/17 (document E/CN.4/Sub.2/1987/L.54) was co-sponsored by 14 members of the Sub-Commission, i.e. Messrs. Al-Khasawne (Jordan), Bhandare (India), van Boven (Netherlands), Mrs. Daes (Greece), Mrs. Gu (China), Messrs. Joinet (France), Martínez Báez (Mexico), Mubanga-Chipoya (Zambia), Simpson (Ghana), Sofinsky (USSR), Türk (Yugoslavia), Valdez (Ecuador), Whittaker (United Kingdom) and Yimer (Ethiopia). It was adopted, in a show-of-hands vote, by 15 in favour, none against and 2 abstentions. The latter were cast by Mr. Carey (United States) and Mr. Deschênes (Canada). Their objections and reservations concerning this initiative can be found in documents E/CN.4/Sub.2/1988/SR.33 (para. 65) and E/CN.4/Sub.2/1988/SR.35 (para. 15) respectively. For details of the quite enlightening discussion which took place on draft resolution L.54 - particularly on whether the nationality of the proposed Special Rapporteur "could affect the objectivity" of an eventual study on the subject - see document E/CN.4/Sub.2/1987/SR.35, paras. 1 to 28.

4/ Document E/CN.4/Sub.2/1987/22, annex I (Recommendations to the Sub-Commission), Recommendation 3.

5/ Ibid., paragraph 75.

6/ Sub-Commission resolution 1987/17, operative paras. 1 and 2. The text of the draft resolution recommended by the Sub-Commission for adoption by the Commission on Human Rights on that occasion appears in document E/CN.4/1988/37 and Corr.1 (Report of the Sub-Commission on its thirty-ninth session), chapter I, section A, draft resolution IX.

7/ It must be noted, however, that the observer Government delegations of Canada and the United States had advanced instant, strong objections to the Sub-Commission's initiative to commission a special study on this subject during the discussion in the Sub-Commission plenary on the Working Group's report (see document E/CN.4/Sub.2/1987/SR.35, paras. 1-6 and 52-55, respectively).

8/ Documents E/CN.4/1988/L.62 and Rev.1. For the details of yet another most enlightening discussion on this issue, see the summary records of the 36th, 37th, 38th, 52nd and 54th meetings of the Commission (documents E/CN.4/1988/SR.36 and Add.1, 37, 38, 52/Add.1 and 54/Add.1).

9/ Document E/1988/12, para. 506.

10/ Most unfortunately, despite such a direct request from the Special Rapporteur, no specific comments on this particular issue were expressed during the discussion, either by the observer delegations accredited by three of the co-sponsors of the text that later became Commission resolution 1988/56 (i.e. Canada, Norway and the United Kingdom), or by those of a number of other

States members of the Commission which - according to his information - participated in the consultations held there on the final wording of that resolution.

11/ The ensuing thorough discussion after the oral presentation made by the Special Rapporteur on that occasion is reflected at length in the report on its sixth session of the Working Group to the Sub-Commission (E/CN.4/Sub.2/1988/24, paras. 92-112).

12/ Document E/CN.4/Sub.2/1988/24/Add.1.

13/ Document E/CN.4/Sub.2/1988/24, para. 112.

14/ Ibid., annex I, Recommendation 3.

15/ The draft, which was later adopted as Sub-Commission resolution 1988/20 (E/CN.4/Sub.2/1988/L.52) was co-sponsored by 19 members of the Sub-Commission, i.e. Mr. Al-Khasawne (Jordan), Mrs. Bautista (Philippines), Messrs. van Boven (Netherlands), Chernichenko (USSR), Mrs. Daes (Greece), Messrs. Diaconu (Romania), Eide (Norway), Hatano (Japan), Joinet (France), Mrs. Ksentini (Algeria), Mrs. Mbonu (Nigeria), Messrs. Rivas (Colombia), Sobarzo (Mexico), Tian Jin (China), Türk (Yugoslavia), Varela (Costa Rica), Mrs. Warzazi (Morocco), Mr. Yimer (Ethiopia) and the Special Rapporteur. It was adopted - on a roll-call vote requested by Mr. Carey, the Alternate for Mr. Treat (the expert from the United States) - by 20 in favour, 1 against and 1 abstention (see E/CN.4/Sub.2/1988/SR.36, paras. 42 and 43). Mrs. Palley (the expert from the United Kingdom) voted against and Mr. Carey abstained. Subsequently, Mr. Eide (the expert from Norway) stated for the record that had he been present during the vote, he would have voted in favour of L.52 (see ibid., para. 44).

16/ The use of the term "progress report" was, obviously, a technical error. The pertinent request was for a preliminary report. It was corrected, at a later stage, by both the Working Group and the Sub-Commission (see paras. 31, 32 and 37 of the present report).

17/ The text of the draft resolution recommended by the Sub-Commission for adoption by the Commission on Human Rights on this occasion appears in document E/CN.4/1989/3, chapter I, section A, draft resolution III.

18/ Notwithstanding, it should be noted that the delegation of one State member of the Commission (the United States) stated, in an explanation of vote, that although the draft resolution recommended by the Sub-Commission on this matter would be adopted without a vote, it would not participate in that action (see document E/1989/20, para. 540).

19/ For the text of the draft resolution recommended by the Commission for adoption by the Council, see document E/1989/20, chapter I, section A, draft resolution V.

20/ Document E/CN.4/Sub.2/1989/36, paras. 93 and 95.

21/ Ibid., annex I, para. 7.

22/ The text of the working paper and the contents of the questionnaires are included as annex VI to document E/CN.4/Sub.2/1990/42 (Report of the Working Group on its eighth session).

23/ For a summary of his statement and the ensuing discussion in the Working Group, see ibid., paras. 131-138.

24/ Ibid., annex I, para. 5.